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ATTORNEY AT LAW

September 29, 2019

Julie Anderson
Commissioner
Department of Commerce, Community & Economic Development
550 West 7th Avenue, Suite 1535
Anchorage, Alaska 99501-3587
(via U.S. mail and email)

Dear Commissioner Anderson,

I represent Erika McConnell in her private and personal capacity regarding her employment as director of the Alcoholic Beverage Control (ABC) Board and Marijuana Control Board (MCB). As you know, both the ABC and MBC boards are housed within your department for administrative purposes, and both are regulatory and quasi-judicial agencies served by a single director. See AS 04.06.010; AS 04.06.070; and AS 17.38.080.

The purpose of this letter is to notify you and other members of the governor's cabinet and their designees—as well as the chairs of both boards—of the law governing Ms. McConnell's appointment and removal as director. This letter does not address, nor does it intend to address, the merits of any of Ms. McConnell's actions or conduct in her capacity as director.

During the last ABC Board meeting in Nome on September 10, 2019, it was apparent that certain personnel in the executive branch, as well as board members on the ABC Board, may

be unaware of, or are misconstruing, the strict statutory and constitutional provisions governing Ms. McConnell's position.

We do not wish to compound these misunderstandings at the next scheduled ABC Board meeting on October 3, 2019, which has been publicly noticed exclusively to "consider . . . a personnel matter relating to the director's performance." Accordingly, I am notifying you and those copied here of your legal obligations in advance of that meeting.

Ms. McConnell has served as the director of the ABC and MBC boards since March 20, 2017. State law provides an explicit procedure for the removal of the ABC and MBC director, which can occur in only one of two ways: By board action, or by action of the governor under explicit circumstances and following specific procedures.

First, with respect to removal by the boards, "[t]he director may be removed by a majority vote of the full membership of the [ABC] board and a majority vote of the full membership of the Marijuana Control Board." See AS 04.06.070.

Like all ABC and MBC board actions, the foregoing action must be taken consistent with the Alaska Open Meetings Act, specifically AS 44.62.310(c)(2). That statute provides that only certain subjects may be discussed in executive session, and that executive session must be called by motion and voted on by a majority of the boards. That statute provides:

[A] motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question.

In an executive session, the boards may consider "subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion." (Emphasis added).

Accordingly, to the extent the boards plan to convene an executive session that in any way touches upon Ms. McConnell's continued service as director of the boards, she is entitled to request a "public discussion" under AS 44.62.310(c)(2) at the October 3 board meeting and at any subsequent board meetings that implicate Ms. McConnell's service or performance.

Personnel issues underlying a board decision to remove or otherwise take adverse action against Ms. McConnell are inherently "subjects that tend to prejudice" her reputation and character, and to which she is entitled a public airing. We strongly encourage the board to avoid this problem by adhering to AS 44.62.310(c)(2) and offering Ms. McConnell, or any other person who may be discussed in such a way as to prejudice their reputation or

character, the opportunity to request a public discussion as required by law. Note that any action taken contrary to the Open Meetings Act is voidable. See AS 44.62.310(f).

Second, with respect to removal by the governor, it is clear that unlike many other boards—and perhaps contrary to his perception and that of his cabinet members and officials—Ms. McConnell does not serve at the governor's pleasure. The governor may remove the director only for cause, specifically “misconduct, misfeasance, or malfeasance in office.” See AS 04.06.070.

And the statute is even stricter than that. It provides: “The governor may not remove the director unless the director is given a copy of the charges and afforded an opportunity to be publicly heard, in person or by counsel, in defense against the charges upon at least 10 days’ notice.” Should the governor choose to exercise his removal power, he must then “file with the lieutenant governor a complete statement of all charges made against the director and the findings based on the charges, together with a complete record of any hearing.”

2015 amendments to state law clarified that these procedures are to be strictly followed. To the extent anyone in the governor’s administration is pressuring board members to take, or refrain from taking, specific personnel actions against Ms. McConnell, they are clearly circumventing state statute and are violating the spirit—if not the letter—of the law.

Moreover, the Alaska Constitution and long-standing Alaska Supreme Court case law make clear that because these boards are regulatory and quasi-judicial agencies, they must remain free from executive interference under basic separation of powers principles.

The Court has held that “the underlying rationale of the doctrine of separation of powers is the avoidance of tyrannical aggrandizement of power by a single branch of government” and that separation of powers is a “brooding omnipresence by virtue of its conceptually central role in the structure of American constitutional government.” *Bradner v. Hammond*, 533 P.2d 1, 5 (Alaska 1976).

Furthermore, the Court has explicitly held that under the Alaska Constitution, the ABC Board is a legislatively-created “regulatory agenc[y] that [is] not under the supervision of the executive.” See *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960) (citing Alaska Const. art. III, sec. 22, 24, 26) (emphasis added).

Accordingly, any attempt by executive branch officials to manipulate the substantive conduct or decision-making process of either the ABC or MBC board is an unconstitutional encroachment upon entities falling squarely within the legislature’s domain. The fact that the boards are, by statute, “quasi-judicial” makes executive encroachment upon them that much more offensive to the constitution, and flirts with the “tyrannical aggrandizement of power” our Constitution is designed to prevent.

Finally, I note that every employment relationship in Alaska is subject to the covenant of good faith and fair dealing, and, as to state employees, the State Personnel Act at AS 39.25.010 et seq. I caution you to keep these laws in mind when dealing with Ms. McConnell.

We trust that both boards and all executive branch employees will strictly adhere to the law and all proscribed procedures in their future dealings with Ms. McConnell. Should they fail to do so, Ms. McConnell reserves the right to avail herself of any and all remedies available to her.

Sincerely,



Elizabeth M. (Libby) Bakalar
Attorney at Law

cc: Bob Klein, Chair, Alcoholic Beverage Control Board (via email)
cc: Mark Springer, Chair, Marijuana Control Board (via email)
cc: Rebecca Cain, Chief Assistant Attorney General, State of Alaska,
Department of Law (via email)